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In The

Supreme Court of the United States

October Term 1988

STEVE COWPER, GOVERNOR OF ALASKA, ET AL.,

Petitioners,

v.

THE SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATE OF CALIFORNIA, JOHN K. VAN DE KAMP, ATTORNEY GENERAL, AND THE ATTORNEYS GENERAL OF THE STATES OF FLORIDA, MASSACHUSETTS, NEW JERSEY, NORTH CAROLINA, OREGON, TEXAS AND WASHINGTON, THE SOUTH CAROLINA COASTAL COUNCIL AND THE COASTAL STATES ORGANIZATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Section 19(c) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1345(c), states that a governor's recommendations on the size, timing and location of an Outer Continental Shelf lease sale "shall" be accepted by the Secretary of the Interior if he determines that the recommendations provide for a reasonable balance between the national interest and the well-being of the citizens of the affected state.

The question presented here is whether the Ninth Circuit gravely misconstrued section 19, thereby voiding the congressional mandate that governors play a "leading role" in OCS leasing decisions, by authorizing the Secretary to reject a governor's reasonably balanced recommendations without giving them the deference required by the statute, thus reducing the substantive consultation process of section 19(c) to a mere procedural formality.

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INTEREST OF AMICI CURIAE

The Attorneys General of California, Florida, Massachusetts, New Jersey, North Carolina, Oregon, Texas, and Washington, and the South Carolina Coastal Council, as a matter of right, and the Coastal States Organization, by consent, file this amici curiae brief in support of Alaska's petition for writ of certiorari. The state amici are all coastal states offshore of which the Department of the Interior, in its 5-year leasing program, has scheduled leasing of Outer Continental Shelf ("OCS") areas. Amici file this brief in support of Alaska's petition for writ of certiorari because the Ninth Circuit has gravely misconstrued the Secretary of the Interior's obligations under section 19 of the OCS Lands Act, 43 U.S.C. § 1345, with the result that the substantive state role explicitly mandated by Congress in section 19 has been reduced to nothing more than a procedural formality.

This case involves the refusal of the Secretary, as upheld by the Ninth Circuit, to defer to the reasonable recommendations submitted by the Governor of Alaska concerning OCS Lease Sale 92. *Tribal Village of Akutan* v. *Hodel*, 869 F.2d 1185, 1189-90 (9th Cir. 1989). Pursuant to section 19(c) of the OCS Lands Act, the recommendations of a governor "shall" be accepted if they strike a reasonable balance between the national interest and the well-being of the citizens of the affected state. This provision is of vital importance to the amici because the consultation procedures found in section 19 provide the only statutory

means by which affected states can exert influence over Interior's leasing decision.[1]

CSO, as a representative association of the governors of the 35 coastal states, commonwealths and territories, recognizes this case as critical in determining the role played by governors in formulating decisions on offshore mineral leasing and development. The member governors of CSO will be affected by the outcome of this litigation and thus have a clear interest in participating as amicus curiae.

The proper interpretation of section 19 is of great concern to all amici because of the importance of Interior's decision to lease. Interior has already formulated its 5-year leasing program and the states have found that they are virtually powerless to influence it. *See, State of Cal.* v. *Watt*, 712 F.2d 584 (D.C. Cir. 1983). Now, with the Ninth Circuit's ruling, the states face the prospect of being unable to influence the even more important leasing decision. With the decision to lease, Interior has decided, in effect, that OCS development can occur in specific areas. This decision determines the areas which may be subjected to OCS exploration, development and

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[1] Among the states represented are two of the Nation's largest producers of OCS oil and gas: Texas and California. Both of these states have had disputes with Interior over OCS lease sales. *See, e.g., State of Texas* v. *Clark*, E.D. Texas, Beaumont Div., No. B-83-743-CA; *State of California* v. *Watt*, 17 E.R.C. 1711 [BNA] (C.D.Cal. 1982). Additionally, Massachusetts, although not a producer of OCS oil and gas, has been forced into litigation with Interior over OCS lease sales. (*See, e.g., Commonwealth of Massachusetts* v. *Clark*, 594 F.Supp. 1373 (D.Mass. 1984).)

production activities including the increased nearshore tankering of oil. Additionally, Interior's decision to lease determines those areas which will bear the brunt of the onshore development which attends OCS activities. Because the consequences of the leasing decision are so significant, it is crucial to amici that the substantive role in that decision provided by section 19 be preserved and that the Ninth Circuit be reversed.

Additionally, Interior's plans to conduct OCS lease sales offshore much of the Nation's coastline – sales which will encompass thousands of square miles – means that many states will be asserting the substantive rights in the lease sale process crafted for them by Congress. This Court should grant Alaska's petition and resolve this question of statutory construction that will have a significant effect on the Nation's coastal states.

The complexity of the question decided by the Ninth Circuit's decision is illustrated by the fact that the District Court of Massachusetts characterized the governor's recommendations under section 19 as "presumptively binding," a view of section 19 quite different from that of the Ninth Circuit. *Conservation Law Foundation* v. *Watt*, 560 F.Supp. 561, 579 (D. Mass. 1983), aff'd on other grounds, 716 F.2d 946 (1st Cir. 1983); *see also, Commonwealth of Massachusetts* v. *Clark, supra*, 594 F.Supp. at p. 1384. While these decisions do not create a conflict between the circuits, the difference of opinion between the Ninth Circuit and the District Court for Massachusetts is a factor which weighs in favor of granting the petition.

Furthermore, this Court should grant the petition because the Ninth Circuit's decision is so flatly contradicted by the mandate of Congress set forth in the OCS Lands Act and its legislative history. In light of the importance of the issue involved, i.e., oil and gas leasing adjacent to the Nation's highly sensitive and valuable coastal areas, and the likelihood that this issue will recur, amici urge that the petition be granted.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT HAS VIOLATED SECTION 19 AND THE MANDATE OF CONGRESS BY ELIMINATING COASTAL GOVERNORS' LEADING ROLE IN OCS LEASING DECISIONS.

1. In this case, the Governor of Alaska submitted recommendations on Interior's proposal to lease OCS tracts in Bristol Bay, an ecologically diverse and sensitive area teeming with marine life and endangered species and home to one of the Nation's most fertile and valuable fisheries – a fishery with an annual economic value of more than $1 billion and which employs over 10,000 people. The Governor recommended in part that the lease sale be delayed for 8 years in order that further environmental studies could be conducted and the risks reduced.[2] The Governor also recommended that tracts

[2] The Governor identified three ways in which risks would be reduced: (1) critical base-line environmental information could be obtained; (2) oil spill clean-up capabilities would be improved; and (3) the oil industry would gain experience operating in other, less sensitive areas of the Bering Sea.

near Unimak Pass be deleted because of the vast array of marine animals, including many endangered and threatened species, which reside near or migrate through it.

The Secretary rejected these recommendations, not because they failed to strike a reasonable balance between the national interest and the well-being of Alaska's citizens, as provided in section 19(c), but rather, because they reached a result different from that which Interior desired to pursue. Thus, the Secretary failed to give any deference to the governor's recommendations. In making his decision, the Secretary also did not properly consider the broad definition of "national interest" found in section 19(c) but instead limited his consideration of "national interest" to the potential recovery of oil and gas from the lease sale area.

The Ninth Circuit's decision upholding the Secretary directly contradicts section 19 for two reasons. First, the Ninth Circuit did not evaluate, or give effect to, the substantive role which Congress established for governors of affected states. Second, the Ninth Circuit improperly endorsed the Secretary's erroneous concept of "national interest," which is plainly contradicted both by section 19 and other provisions of the OCS Lands Act. The net effect of this decision is to nullify section 19 and to render meaningless the substantive role which Congress established for the governors.

2. When Congress amended the OCS Lands Act, 43 U.S.C. §§ 1331 et seq., in 1978, it sought both to limit the discretion of the Secretary and to institute a substantive role in the OCS leasing process for the governors of affected states. In so doing, Congress attempted to rectify

the "essentially open-ended grant of authority to the Secretary of the Interior to proceed with leasing on the Outer Continental Shelf" which was allowed under the original 1953 statute. H.Rep. 95-590, 95th Cong., 1st Sess. at p. 102; *reprinted in*, 1978 U.S. Code Cong. & Admin. News, at p. 1509. The House Select Ad Hoc Committee on the OCS found that " . . . the present law's grant of discretion to the Secretary led to a situation where the petroleum industry had . . . a too dominant voice in the setting of policy." (*Id.*)

The frustrations of state officials over a federally controlled program that could severely impact state beaches, estuaries and coastal resources was recognized by the House Select Committee:

> "[A] major purpose of H.R. 1614 is to involve the States and affected local areas within the States in the entire exploitation process to a greater degree. . . . All recommendations by a Governor of an affected State, . . . with regard to a proposed lease sale or proposed production and development plan . . . *must be accepted by the Secretary* if he determines that they are consistent with the national interest." H.Rep. 95-590, *supra*, at p. 50; 1978 U.S. Code Cong. & Admin. News, at p. 1457; emphasis added.

With this clear purpose and decision in mind, Congress enacted section 19(c), 43 U.S.C. § 1345(c), which provides in pertinent part:

> "The Secretary *shall accept recommendations* of the Governor and may accept recommendations of the executive of any affected local government if he determines, after having provided the opportunity for consultation, that they provide for a reasonable balance between the national interest and the well-

being of the citizens of the affected State. . . ." Emphasis added.

Section 19 is the method by which Congress sought to implement this increased participation in the OCS leasing process. In enacting section 19, Congress expressed its unmistakable intent that a governor's reasonably balanced recommendation would receive deference and would be accepted and incorporated into the Secretary's leasing decision. This carefully crafted mechanism accomplishes the congressional goal of attempting to end a system in which the federal government and the oil industry made OCS decisions in disregard of the interests of the states, while not granting the states an absolute "veto" over such decisions. H.Rep. 95-590, *supra*, at pp. 50, 104-106, 153; 1978 U.S.Code Cong. & Admin. News, at pp. 1457, 1510-1512, 1559.

Congress recognized that OCS development creates major impacts on coastal states, 43 U.S.C. § 1332(4), and consequently, acted through section 19 to provide coastal states with a "real role" in OCS leasing decisions. H.Rep. 95-590, *supra*, at p. 104; 1978 U.S. Code Cong. & Admin. News at p. 1510. The Conference Committee stated, "This section [section 19] is intended *to insure* that Governors of affected states . . . have a *leading role* in OCS decisions and *particularly as to potential lease sales* and development and production plans." H.Conf. Rep. 95-1474, 2d Sess. (1978) at p. 106, *reprinted in* 1978 U.S. Code Cong. & Admin. News, at p. 1706; emphasis added; *accord* H.Rep. 95-590, *supra*, at p. 152. Congress thus contemplated that the advice of governors would be incorporated into the Secretary's decision, to the extent that it was consistent with the balanced approach to OCS leasing found in the Act.

H.Rep. 95-590, *supra*, at pp. 152-153; 1978 U.S. Code Cong. & Admin. News. at p. 1559.

Section 19 and its legislative history can only be interpreted as establishing a preeminent, substantive role for the governor of an affected state in the Secretary's OCS leasing decision. At a minimum, by creating a "leading role" for the governor, Congress intended that substantial deference be given to the governor's reasonable recommendations. Without granting a governor a "veto" over OCS leasing decisions, such deference insures a leading role for the governor. To interpret section 19 as giving the governor the lesser role found by the Ninth Circuit renders the statute a nullity.

3. The Ninth Circuit eviscerated the requirements of section 19 when it stated:

> "The plain language of section 19 limits the court to reviewing the rationality of the Secretary's determinations; the court cannot 'substitute its judgment for that of the [Secretary].' [Citation.] . . . *Even if we agreed that the Governor's recommendations were reasonable, we could not conclude the Secretary was arbitrary or capricious simply because he chose to reject them.*" *Tribal Village of Akutan, supra,* 869 F.2d at p. 1190; emphasis added.

The Ninth Circuit reached this conclusion without so much as a single reference to the legislative history of section 19. *Id.*, at pp. 1189-1190. If the Secretary bears no obligation to accept reasonable recommendations, then section 19(c) has been voided.

When properly interpreted, section 19 creates two tiers of review. First, section 19(c) gives the governor of

the affected state the opportunity to make recommendations concerning a proposed lease sale. In making these recommendations, the governor must to strike "a reasonable balance between the national interest and the well-being of the citizens of the affected State." 43 U.S.C. § 1345(c). If the governor strikes that balance so that his recommendations fall within the range of reasonableness, the Secretary must defer to the governor and accept his recommendations.

Second, section 19(d) provides that the Secretary's decision to accept or reject a governor's recommendations may be reversed only if found to be arbitrary or capricious. Part of a court's review must involve a determination that the Secretary has properly deferred to the governor in reviewing his recommendations. Thus, just as the Secretary must defer to the governor unless the governor's recommendations fall outside a broad range of reasonableness, the court must defer to the Secretary's determination unless it is arbitrary or capricious.

Here, the Ninth Circuit, relying solely on section 19(d), upheld the Secretary even though he did not defer to the governor and did not determine that the governor's recommendations were unreasonable. By focusing solely on section 19(d) to the exclusion of the broader role for governors spelled out in section 19(c), the Ninth Circuit has used section 19(d) to swallow section 19(c), thus judicially negating the substantive role crafted by Congress for the governors of affected states.

4. Beyond its restrictive view of a governor's role under section 19, the Ninth Circuit also endorsed the Secretary's improper definition of "national interest" as that term is

used in section 19(c). The Secretary limited his definition of "national interest" to include only the goal of developing oil and gas supplies.[3] This narrow focus is not only contrary to the intent of Congress as expressed in section 19(c), but also is at odds with the concept of balance found throughout the 1978 OCS Lands Act Amendments.

In section 19(c), Congress defined "national interest" to include more than the recovery of petroleum resources or industry interest in exploration for those resources:

> "For purposes of this subsection, a determination of the national interest shall be based on the desirability of *obtaining oil and gas supplies in a balanced manner and on the findings, purposes and policies of this subchapter.*" 43 U.S.C. § 1345(c); emphasis added.[4]

The concept of balance found in section 19 is derived from the concept of balance found throughout the 1978 amendments. *See*, H.Rep. 95-590, *supra*, at pp. 152-153; 1978 U.S. Code Cong. & Admin. News at pp. 158-159. In

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[3] The Ninth Circuit confirmed Interior's approach:

> "As the district court held, the Secretary adequately balanced the nation's interest in developing oil and gas supplies against its policy of protecting the environment." *Tribal Village of Akutan, supra*, 869 F.2d at p. 1190.

This does not reflect a proper balancing of the different national interest objectives which is required by section 19. At a minimum, the court should have required the Secretary to consider fisheries conservation and other environmental benefits derived from Bristol Bay as elements of the national interest.

[4] Because the Ninth Circuit examined the Secretary's decision only to determine whether it was based "on a consideration of the relevant factors," the court never examined whether the Secretary's determination of the reasonableness of the balance struck by the Governor was arbitrary or capricious.

the purposes and policies of the amendments, Congress clearly indicated that OCS oil and gas discovery and development was to involve a balance between resource recovery on the one hand and the environmental risks and adverse impacts on coastal states posed by such recovery on the other hand. *See, e.g.*, 43 U.S.C. § 1802(2), (4), (5), (6), (7), (10), (11), (13), (14); § 1332(3), (4), (5).

The House Committee emphasized this concept of balance:

> "H.R. 1614 vests new and increased responsibility in the Secretary of the Interior. Specific purposes, policies and findings detail that this power is to be used to provide for rational management of the oil and gas resources of the Outer Continental Shelf. *National energy requirements, affected states' needs, environmental protection, alternate uses of the coastal waters and lands, and economic reality, are all to be taken into account.*" H.Rep. 95-590, *supra*, at p. 46; 1978 U.S. Code Cong. & Admin. News at p. 1453; emphasis added.

By using the term "national interest," Congress did not intend to elevate oil and gas recovery over other relevant interests. Rather, the Secretary must include coastal state economic and environmental concerns, *see, e.g.*, 43 U.S.C. §§ 1332, 1801(10), 1801(11), 1802(4), 1802(5), 1802(6), and the minimization or elimination of conflicts between oil and gas exploitation and other uses of the sea such as fishing and recreation, *see, e.g.*, 43 U.S.C. §§ 1801(13), 1802(7). In its findings, Congress also made specific reference to the need to eliminate the conflicts between oil and gas development and fishing and recreation, 43 U.S.C. § 1801(13), and the protection of the renewable resources of the OCS, 43 U.S.C. § 1801(14). It is

only in this context that the Secretary can properly determine the "national interest" and then balance it with the well-being of the citizens of the state.

In his recommendations on Lease Sale 92, Governor Sheffield focused on the need to protect Bristol Bay's fishery as a renewable resource of great economic and environmental importance not only to the citizens of Alaska but also to the citizens of other states. It is just such interests that section 19 requires be accommodated by the Secretary in his definition of "national interest."

Interior made clear its narrow view of "national interest" in its December 1985 "Statement of the Reasons for the Decision on Sale 92." Hereafter, "SR". In the SR, Interior analyzed the findings, purposes and policies of the OCSLA so as to completely ignore the goals of overall balance and of protection of the environment found throughout the statute. SR at pp. 32-34. Instead, Interior focused on the dollar value which it expected to receive from the lease sale and made its narrow determination that this dollar value outweighed the potential harms to the Bristol Bay fishery. *Id.*, at pp. 34-35.

Interior thus ignored the delicate balance between the "national interest" as broadly defined in the OCS Lands Act to include the effects on the human, marine and coastal environments, and the well-being of the citizens of Alaska, as achieved in Governor Sheffield's recommendations. Instead, Interior improperly focused solely at its projections of economic value. See SR at p. 37.

In taking this approach, the Secretary basically ignored the benefits of Bristol Bay's fisheries and other natural resources both to the Nation and to Alaska. This

very limited view of section 19 and its definition of "national interest" is directly contrary to what Congress contemplated when it enacted the 1978 OCS Lands Act Amendments.

II

THIS COURT MUST PRESERVE THE LEADING ROLE OF COASTAL STATES IN THE OCS LEASING DECISION

In considering the application of section 19 to OCS lease sales, this Court must recognize the critical importance of the OCS leasing process to adjacent coastal states. It is for this reason that the substantive role of the coastal states in the OCS leasing decision, as established by Congress in section 19, must be preserved.

In *Secretary of the Interior* v. *California*, 464 U.S. 312, 339 (1984), this Court stated that the purchase of an OCS lease "entails no right to proceed with full exploration, development, or production . . . ; the lessee acquires only a priority in submitting plans to conduct these activities." The Ninth Circuit has focused on this statement, as well as the staged nature of the OCS process, in an attempt to limit the importance of the actual leasing process. See *Tribal Village of Akutan, supra*, 869 F.2d at pp. 1187-1188. By focusing on the later stages, the Ninth Circuit has improperly justified its limitation of the role which the governors play in the leasing decision.

An OCS lease sale is a critical event both for the oil industry and for adjacent states in the Ninth Circuit and elsewhere. Notwithstanding this Court's earlier statement that an OCS lessee acquires only a priority in submitting

plans, the OCS Lands Act makes clear that a lessee acquires substantial rights:

> "An oil and gas lease issued pursuant to this section shall
>
> ". . . .
>
> "(4) *entitle* the lessee to explore, develop, and produce the oil and gas contained within the lease area, conditioned upon due diligence requirements and the approval of the development and production plan required by this subchapter. . . ." 43 U.S.C. § 1337(b)(4); emphasis added.

Given the huge sums of money which frequently are bid for OCS leases, it is hardly surprising that the oil and gas industry believes that the companies are purchasing valuable rights which entitle them to explore, develop and produce oil and gas so long as applicable statutory and regulatory requirements are met.

From the perspective of the amici, the OCS lease sale is a pivotal decision point. With the decision to conduct the sale, Interior has, in effect, made the decision that OCS development can occur in specific areas. This decision determines which tracts will be offered and which areas may be subjected to OCS exploration, to OCS development and production platforms and to increased tankering.[5] Interior's leasing decision also determines those

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[5] Both of the transportation scenarios reviewed in the final environmental impact statement for Sale 92 involve the tankering of produced oil. In his section 19 recommendations on the sale, Governor Sheffield specifically raised his concerns about tanker accidents. November 5, 1985, letter from Governor Sheffield to Secretary Hodel, at pp. 4-5, Enclosure IV at pp. 9-10. In

(Continued on following page)

coastal areas which will have to bear the brunt of the onshore development which attends OCS exploration and development, i.e., those areas which may have to provide land for onshore industrial support facilities, find space in harbors for support vessels and deal with environmental impacts which travel from the OCS to onshore areas, e.g., air pollutant emissions.

There are later decision points at which some of these factors can be considered, but it is only at the lease sale stage that a comprehensive impact review can be made and that a governor can recommend that certain areas not be leased because of their sensitivity or because of the inability of onshore areas to absorb the impacts which will accompany development.[6] In light of the entitlement to explore, develop and produce which an oil company acquires with an OCS lease, the ability of a governor to submit comprehensive section 19 recommendations on the OCS lease sale, and have those recommendations accorded substantial weight and deference, remains critical.

(Continued from previous page)

light of the recent *Exxon Valdez* accident, these concerns were reasonable. Many of the amici states have had to deal with the effects of tanker spills, and all of the amici are concerned about the increases in nearshore tankering which OCS development frequently causes.

[6] Under section 19, a governor also has the opportunity to submit recommendations on a proposed development and production plan. 43 U.S.C. § 1345(a). Under the Ninth Circuit's interpretation of section 19, however, these recommendations can be rejected as easily as the recommendations on the lease sale itself.

Here, Governor Sheffield made recommendations which, in part, would have delayed the sale and deleted tracts from the sale area. If these measures had been accepted, the people of Alaska would have been assured that OCS development would not have occurred in the sensitive and valuable Bristol Bay area or near equally sensitive Unimak Pass. These assurances would in turn have established that the other uses of the area, in particular fishing, would not be disrupted by OCS activities in the near future, that the oil industry would not be competing for scarce onshore resources, and that one of the Nation's great fisheries would not be subjected to the risks of oil spills from platforms and tankers.

The amici states have exactly the same sorts of concerns about the impacts which accompany OCS leasing and development. Texas and California, as two of the Nation's largest producers of OCS oil and gas, have seen the major industrialization onshore which accompanies OCS development. Interior has scheduled leasing off the coasts of the other amici states, and they too are concerned about the effects which may follow.

While the OCS development process occurs in stages, an affected state's input into the decisions made during the stages which follow the lease sale cannot, and does not, provide an adequate substitute for the ability of states to influence the actual leasing decision. The question of *whether* any development is appropriate is properly addressed at the lease sale stage before resources are expended on exploration and development by either the industry or federal agencies. For example, while the OCS Lands Act requires that the Secretary approve a development and production plan prior to a company actually

commencing development drilling, 43 U.S.C. § 1351, the Secretary's review and approval does not extend to the question of whether or not development should occur at all. Rather, the review conducted by the Secretary is limited almost entirely to the question of how development should occur. 30 C.F.R. § 250.34.[7]

Indeed, under Interior's regulations, the primary term of a lease can be extended only if the lessee is producing or conducting drilling operations. 30 C.F.R. §§ 250.13, 256.37. Thus, during the primary term of the lease, the lessee must explore the tract and obtain approval of a development and production plan in order to retain its lease rights. If oil is discovered, these due diligence requirements insure that development of leased tract will occur.

Similarly, the ability of states with federally-approved coastal programs to "veto" OCS exploration and development plans, which this Court described in *Secretary of the Interior* v. *California, supra,* 464 U.S. at p. 341, is not a substitute for the ability to influence Interior's decision on the lease sale.[8] State review of

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[7] 30 C.F.R. § 250.34(l)(3)(iv) provides that a development and production plan can be disapproved if conditions exist which are comparable to those allowing cancellation of a lease. *See* 30 C.F.R. § 250.12(a)(1)(i)-(iii). In light of the fact that Interior has never invoked these provisions to cancel a lease issued under the 1978 amendments, their effectiveness is open to substantial doubt.

[8] Not all coastal states affected by OCS leasing and development have coastal zone management plans, e.g., Texas, and thus not all can review OCS exploration and development plans under 16 U.S.C. section 1456(c)(3)(B).

exploration and development plans under section 307(c)(3)(B) of the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(3)(B), generally is limited to the individual plan under review. Thus, the environmental impact statement prepared on a specific development and production plan will not analyze the question of whether the particular tract(s) should have been leased or whether the sale as a whole should have occurred.[9]

Additionally, the "veto," i.e., a finding that an OCS activity is inconsistent with an affected state's federally-approved coastal management plan, which is provided in the CZMA, 16 U.S.C. § 1456(c)(3)(B), is subject to review and to override by the Secretary of Commerce. In at least one opinion issued by the Secretary of Commerce involving an OCS development and production plan offshore California which the state had found inconsistent with its coastal management plan, the Secretary made clear that unless an alternative proposal were approved by the state, he would override the objection of California and allow the project to proceed. Department of Commerce, "Findings and Decision - In the Matter of the Appeal of Exxon Company, U.S.A. to the Consistency Objection of the California Coastal Commission to Exxon's Proposed Development of the Santa Ynez Unit by Means of Development Option A, February 18, 1984." While the amici states do not necessarily agree with this view, the Secretary of Commerce has thus indicated that for him the CZMA veto is not absolute and that completely barring

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[9] While Interior does prepare environmental assessments on exploration plans, to date it has not prepared an environmental impact statement for any exploration plan.

an OCS development and production project is not among the available options under the CZMA.[10]

If states are realistically to influence the OCS process in order to protect the environmental and economic interests of their citizens, they must have the ability to influence leasing decisions. Section 19 provides the only statutory means available to the states to formally and substantively influence OCS leasing decisions. If the Ninth Circuit's interpretation stands and is followed by

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[10] The Secretary reviews the objection by a coastal state to an individual OCS project. Thus, the review by the Secretary does not extend to the onshore infrastructure which an OCS project may require. While one would normally assume that local onshore jurisdictions would be free to apply their zoning laws and permitting procedures to onshore facilities, the United States Department of Justice has recently stated with regard to local ordinances addressing such onshore facilities:

> "These ordinances have been preempted by the OCSLA which not only authorizes the Secretary [of the Interior] to decide when and where the OCS will be developed but also requires the Secretary to prepare plans for the development of the OCS which reflects [sic] a [sic] equitable sharing of the benefits and burdens of development of the OCS among the OCS regions. *By requiring onshore support facilities supporting offshore oil and gas to be favorably approved by localities,* these ordinances unconstitutionally attempt to usurp these congressionally imposed duties of the Secretary and to frustrate the purposes of the OCSLA." Brief for the United States as Amicus Curiae, p. 3, in *Western Oil and Gas Association, et al.* v. *Sonoma County, et al.*, 9th Cir. No. 88-6608; emphasis added.

Thus, according to the Department of Justice, it is unconstitutional to submit plans for *onshore* facilities to local permit review. If this position is confirmed by the courts, then the need for an effective section 19 will be even more acute.

other circuits, then this formal, substantive role will be lost and the goals of Congress frustrated. To assure the effectiveness of section 19 and thus to affirm the substantive role established for the states by Congress, this Court must grant Alaska's petition and reverse the Ninth Circuit.

CONCLUSION

For the foregoing reasons, amici respectfully urge that the State of Alaska's petition for writ of certiorari be granted.

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